No. 80-5392

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In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT HOWE, SR.,

Petitioner,

— v. —

WILLIAM FRENCH SMITH,
ATTORNEY GENERAL OF THE UNITED STATES,

NORMAN CARLSON,
DIRECTOR OF THE UNITED STATES BUREAU OF PRISONS,

AND

WILLIAM CIUROS, JR.,
COMMISSIONER OF CORRECTIONS, STATE OF VERMONT,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT CIUROS

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QUESTION PRESENTED

Whether the authority of the Federal Bureau of Prisons to receive state prisoners into federal penal or correctional institutions is limited by statute to cases where appropriate treatment facilities and personnel are available in the federal prison system for inmates with specialized treatment needs.

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BRIEF FOR RESPONDENT CIUROS

OPINIONS BELOW

The opinion of the United States District Court for the District of Vermont (J.A. 31-37) is reported at 480 F. Supp. 111 (1979). The opinion of the United States Court of Appeals for the Second Circuit (J.A. 38-45) is reported at 625 F.2d 454 (1980).

JURISDICTION

The judgment of the Court of Appeals (J.A. 46-47) was entered on June 23, 1980. A petition for a writ of certiorari was timely filed by mailing on September 11, 1980 and docketed in the Supreme Court on September 15, 1980. Certiorari was granted on January 26, 1981. This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §5003, "Custody of State offenders," reads as follows:

> (a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: Provided, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.
>
> (b) Funds received under such contract may be deposited in the Treasury to the credit of the appropriation or appropriations from which the payments for such service were originally made.
>
> (c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.
>
> (d) The term "State" as used in this section includes any State, territory, or possession of the United States, and the Canal Zone.

STATEMENT OF THE CASE

In December, 1974, Vermont, having determined its 166 year old maximum security prison to be woefully inadequate, announced that it would close the facility by June 30, 1975.[1] With the closing of that facility, Vermont would have neither a long-term maximum security facility, nor the capability to provide long-term treatment and programs within an institutional setting. To provide for the small number of prisoners who require maximum security confinement or require rehabilitative treatment and programs not available within the state, Vermont and the Government of the United States, in February, 1975, entered into an agreement under which terms the United States certified that it had facilities available and agreed to accept into the Federal Bureau of Prisons up to forty Vermont prisoners. (Joint Appendix page 10.)

On December 13, 1976, petitioner was convicted of first degree murder and on February 2, 1977, he was sentenced to a term of life imprisonment. He was given credit toward service of his term for the 21 months and 31 days spent in custody prior to sentencing. (Joint Appendix page 21.)

On February 16, 1977, petitioner was notified that the Classification Committee was recommending he be transferred out of state. He was informed of the recommendation and of the reason for that recommendation. He was advised that there would be an administrative hearing at 1:00 P.M. on February 22, 1977, to consider that recommendation and that he had the right to be present at the hearing, to give testimony, call witnesses, present documentary evidence and to be represented by lay counsel of his choice. (Joint Appendix pages 27–29.)

The hearing was held on February 22, 1977. Evidence presented to the hearing officer indicated that petitioner was "highly resistant to treatment", that "therapeutic intervention

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[1]The circumstances surrounding the decision to close the archaic prison are set forth in *Rebideau v. Stoneman*, 398 F. Supp. 805 (D. Vt. 1975), *aff'd* 575 F.2d 31 (2d Cir. 1978) (per curiam).

would be close to impossible", that petitioner was "a most dangerous person who could well repeat the same pattern of assaultive behavior toward women at any time in the future", and that he was an escape risk who, in fact, had escaped from Vermont's most secure wing while in pre-trial detention status. (Joint Appendix pages 21–26.)

The hearing officer's report was forwarded to the Commissioner of Corrections. On March 9, 1977, the Commissioner directed that petitioner be transferred to the Federal Bureau of Prisons. (Joint Appendix pages 19–20.) The Commissioner's determination (Joint Appendix page 19) was based on the findings of the hearing officer that the Vermont Department of Corrections could not provide the required degree of security and that the specific program needs of petitioner could not be provided by the Vermont Department of Corrections in a maximum security setting. (Joint Appendix pages 25–26.)

Based on personal visits to at least five federal facilities, on general knowledge of the bureau and its operation, and from yearly reports published by the bureau, the Commissioner was familiar with the programs available in the Federal Bureau of Prisons. (Trial transcript pages 17–18.) The Commissioner knew that the bureau had the capacity to offer the widest range of programs within a maximum security setting, and that the Vermont Department of Corrections did not have that capacity. (Trial transcript page 19.) Additionally, the Commissioner knew that under the terms of the agreement between the Government of the United States and the State of Vermont, the Bureau of Prisons would provide a full range of programs for those state prisoners transferred to it. (Trial transcript page 29.) Accordingly, the Commissioner, having determined that the Vermont Department of Corrections did not have the capacity to offer plaintiff treatment and programs within the required degree of security, directed petitioner's transfer to the Federal Bureau of Prisons.

Subsequent to the decision of the United States Court of Ap-

peals for the Seventh Circuit in *Lono v. Fenton*, 581 F.2d 645 (7th Cir. 1978), petitioner brought this action. His claim, in substance, is that since the Director of the Bureau of Prisons had made no pretransfer determination that the bureau had specialized treatment programs available for petitioner which were not available within the Vermont Department of Corrections, petitioner's confinement in a federal institution was contrary to the requirements of 18 U.S.C. §5003 and, hence, unlawful. Accordingly, he sought return to the State of Vermont. (Joint Appendix pages 3–5.)

In its decision, the United States District Court for the District of Vermont held that 18 U.S.C. §5003 plainly and unambiguously requires no showing of specialized treatment needs or facilities before a Vermont state prisoner may be transferred to the federal prison system in accordance with the contract under which petitioner was transferred. The Court found 18 U.S.C. §5003 to require nothing more of the Director than a certification that facilities exist within the federal system in which state prisoners may be accommodated. *Howe v. Civiletti,* 480 F. Supp. 111, 115 (D. Vt. 1979). (Joint Appendix page 37.)

On appeal, the United States Court of Appeals for the Second Circuit held that 18 U.S.C. §5003 authorizes states to contract not simply for "treatment" but the "custody, care, subsistence, education treatment, and training of persons convicted".

> Nothing in this grammatical construction gives "treatment" the primacy which Howe contends for, or provides a basis for concluding that, whatever other services are provided, treatment must in all events be furnished prisoners subject to any federal-state contract authorized by the statute.

Howe v. Civiletti, 625 F.2d 454, 457 (1980.) (Joint Appendix page 44.) The Court of Appeals affirmed the Order of the District Court denying petitioner relief.

SUMMARY OF THE ARGUMENT

18 U.S.C. §5003(a) provides authority for the Federal Bureau of Prisons to contract with state officials for the "custody, care, subsistence, education, treatment and training" of state prisoners provided the Director certifies that proper and adequate treatment facilities and personnel are available. The plain language of the statute reposes discretion in federal officials to accept the transfer of state inmates. The only limitations imposed by Congress on the Director are that there be space available to house the inmate and personnel to care for him as well as insuring that the sending state would reimburse the federal government for the custody and care of the state inmate.

Applying the rationale used in arguments advanced for a restrictive construction of 18 U.S.C. §5003(a) to similar provisions in the United States Code relating to Prisons and Prisoners (Part III, Title 18, United States Code) would create in the prisoner due process entitlements in decisions respecting designation and redesignation of place of confinement as well as classification decisions. Federal courts, however, have rejected arguments that inmates have a liberty or property interest in these decisions.

A restrictive construction of section 5003(a) would not only offend the plain language of that section but also would sap all meaning and vitality from section 5003(c). Section 5003(c) provides that state inmates transferred to the federal system are subject to the same laws and regulations applicable to the federal prisoners.

Statutes should not be interpreted so as to yield absurd results. A narrow construction of §5003(a), however, would either result in a transfer for specialized treatment which thereafter does not have to be rendered, or voids section 5003(c) completely.

The legislative history of section 5003 supports the interpretation given it by the Second Circuit. The House Report

itself stated the purpose was to permit transfers when "federal facilities" are available. Support for a restrictive interpretation of section 5003(a) can be found only by reading one passage of the legislative history, and that out of context.

Further, the administrative interpretation given section 5003(a) by the Bureau of Prisons, the agency charged with its administration, for the 29 years since that statute's enactment is entitled to deference. Indeed, if Congress were at odds with the interpretation given section 5003 by the bureau it so could have indicated in its 1965 amendments to that statute. The legislative history of the amendment supports the interpretation given section 5003 by the Second Circuit.

The administrative procedures given petitioner prior to his transfer to the federal system, procedures developed on guidance from the federal courts, more than satisfied any interest embodied in section 5003.

The question presented this Court is one of statutory construction. Policy arguments raised by petitioner should be directed to the Congress. Constitutional claims interjected by *amicus curiae* should be presented first to a trial court.

ARGUMENT

I.
18 U.S.C. §5003 DOES NOT REQUIRE A PRIOR FINDING THAT SPECIALIZED TREATMENT IS UNAVAILABLE IN THE STATE

A narrow issue before this Honorable Court is whether the transfer of a state prisoner to federal custody, pursuant to 18 U.S.C. §5003, must be preceded by a determination that "specialized treatment" is unavailable in the state system.

For reasons which follow, the State of Vermont contends that it does not.

A.

18 U.S.C. §5003 MERELY REPOSES FULL DISCRETION IN FEDERAL PRISON OFFICIALS TO ACCEPT CUSTODY OF STATE INMATES

Section 5003, on its face, does not require a determination that specialized treatment is unavailable. Rather, it merely requires federal prison officials to "certify that proper and adequate treatment facilities and personnel are available." The debate in the various District Courts and Circuit Courts of Appeals has turned on whether this phrase merely requires that there be sufficient space to house, and staff to care for, a state prisoner, or rather, whether it requires a showing, in each individual case, of specialized treatment needs of the state prisoner which cannot be met by the state but for which treatment is available in the federal system.

In the matter now before this Court the United States District Court for the District of Vermont held:

> [T]he act plainly and unambiguously requires no showing of specialized treatment needs or facilities before a Vermont state prisoner may be transferred to the federal prison system in accordance with [§5003]. . . . In contracting with state officials, 18 U.S.C. §5003(a) requires nothing more of the Director of the Bureau of Prisons than a certification that facilities exist within the federal system in which state prisoners may be accommodated. That requirement has been met in the case at hand.

Howe v. Civiletti, 480 F. Supp. 111, 115 (D. Vt. 1979), *aff'd* F.2d 454 (2d Cir. 1980). On review the United States Court of Appeals for the Second Circuit affirmed the District Court's order holding:

> The statute authorizes states to contract not simply for "treatment", but the "custody, care, subsistence, education, treatment and training of persons convicted". Nothing in this grammatical construction gives "treatment" the primacy which Howe contends for, or provides a basis for concluding

> that, whatever other services are provided, treatment must in all events be furnished prisoners subject to any federal-state contract authorized by the statute.

Howe v. Civiletti, 625 F.2d 454, 457 (2d Cir. 1980).

In *Sisbarro v. Warden,* 592 F.2d 1 (1st Cir.), *cert. denied,* 444 U.S. 849 (1979), the court explicitly rejected a restrictive construction of section 5003(a) apparently because it reads that section as reposing discretion in prison officials which is not ordinarily the subject of judicial review:

> This provision [§5003] "merely authorizes the federal government to make arrangements with a state whereby a state's prisoners may be confined when the state feels that either it or the prisoner may benefit from the arrangement". (Citations omitted).

Sisbarro, supra, 592 F.2d at 4.

In *Beshaw v. Fenton,* ____F.2d____, No. 79-1777 (3d Cir. Dec. 15, 1980), *petition for cert. filed,* March, 1981, the Third Circuit, faced with precisely the same issue and factual setting as this case, held:

> We find that the language of Section 5003, construed in the light of the legislative history of the provision, is best understood as not requiring a showing of need for specialized treatment before a transfer from state to federal custody may be authorized. The statute provides that the Attorney General can contract with appropriate representatives of the States "for the custody, care, subsistence, education, treatment and training" of convicted persons. The purposes of the statute appear to include care, custody, subsistence, education and training as well as treatment, and we do not believe that this statutory language can be fairly read as requiring that any one of these purposes must be applicable to every case. While Section 5003 also states that transfers can take place only when the Director of the Bureau of Prisons certifies that "proper and adequate treatment facilities and personnel are available", we doubt that this clause can be in-

> terpreted as requiring any more than that federal facilities and personnel be adequate to handle any prisoners received; we do not find that it places a substantial restriction on the purposes for which prisoners may be transferred.

Beshaw, supra, Slip opinion at 9.

The United States Court of Appeals for the Tenth Circuit recently concluded that there is no basis in the language of the statute for a narrow reading of section 5003(a). It held that contracts not only for treatment, but also for custody, care, subsistence, education and training of convicted persons are authorized. *Fletcher v. Warden,* ____F.2d____, Docket No. 79-1156, et al. (10th Cir. Feb. 13, 1981).

In *United States ex rel Gereau v. Henderson,* 526 F.2d 889 (5th Cir. 1976), the court observed that section 5003:

> [M]erely authorizes the federal government to make arrangements with a state whereby a state's prisoners may be confined in a federal institution when the state feels that either it or the prisoner may benefit from such an arrangement.

Id. at 884.

The United States Court of Appeals for the Seventh Circuit, in a panel decision, held:

> there is simply nothing in the language of the statute itself that restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment.

Lono v. Fenton, slip op., at 5. 23 C.L.R. 2018 (7th Cir. 21 Feb. 1978).

That panel decision, however, was subsequently reversed by a 4–3 decision of the Seventh Circuit sitting *en banc. Lono v. Fenton,* 581 F.2d 645 (7th Cir. 1978). In *Lono* the majority found the term "treatment facilities" to be unique. The Court observed that elsewhere the statutes relating to the federal prison system refer to the facilities as "penal and correctional institutions" and not "treatment facilities". The Seventh Circuit,

reading §5003 as emphasizing "treatment facilities", held that it necessarily follows that the only authorized purpose for any transfer is the provision of specialized treatment.

Vermont maintains, however, that the language used by Congress is not so "unique" as to compel the restrictive construction given §5003 by the Seventh Circuit. Rather, functionally identical federal statutes, containing various terms to refer to a penal institution, have been uniformly construed by the courts as reposing complete discretion in prison officials to transfer inmates without affording due process protections.

For example, 18 U.S.C. §4042 requires, *inter alia,* that "suitable quarters" be provided all federal inmates:

> The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> * * *
>
> (2) provide suitable quarters and provide the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise. . . .

18 U.S.C. §4082(b) provides that any transfer of a federal prisoner must be to an "available, suitable, and appropriate institution or facility":

> The Attorney General may designate as a place of confinement *any available, suitable, and appropriate institution or facility,* whether maintained by the Federal Government, or otherwise, and whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another. (Emphasis added).

If the restrictive construction of section 5003(a) controlled, inmates confined in the Federal Bureau of Prisons would have an expectation not to be moved to another institution unless it is first determined to be "available, suitable, and appropriate".

However, in *Walker v. Hughes,* 558 F.2d 1247, 1252–1253 (6th Cir. 1977), the court held that 18 U.S.C. §§4042 and

4082(b) do not create a liberty interest in federal prisoners, but rather "gives federal prison officials full discretion" to transfer inmates:

> Federal statutory law gives federal prison officials *full discretion in the treatment of prisoners* and does not restrict the authority of prison officials over the inmates as to placement in more restrictive living status, transfer to other prisons, subjection to significant and adverse effects on parole dates, and deprivation of privileges. Under 18 U.S.C. §4042, the Bureau of Prisons is invested with the responsibility of management and regulation of the federal prison system. Under 18 U.S.C. §4082(b), the Attorney General has the authority to transfer a prisoner from one penal institution to another at any time. (Emphasis added).

Other courts also have held that the Attorney General, pursuant to 18 U.S.C. §4082, has the unfettered discretion to transfer a prisoner from one place of confinement to another at any time, *Buckley v. United States,* 494 F. Supp. 1000, 1002 (E.D. Ky. 1980); and for any reason whatsoever or for no reason at all. *Robinson v. Benson,* 570 F.2d 920, 923 (10th Cir. 1978).

In *United States ex rel. Gereau v. Henderson,* 526 F.2d 889 (5th Cir. 1976), the court observed:

> This review . . . persuades us that, even though a serious disadvantage may accompany even an administrative transfer, the practical necessities of prison administration require that the *administrative* decision to transfer an inmate remain within the sound discretion of prison authorities. . . . A non-disciplinary transfer is closely akin to the initial determination of the place and specific facility for confinement which, in the federal system, is almost wholly confided in the Attorney General. 18 U.S.C. §4082.

Id. at 896–897.

Similarly, in *McDonnell v. United States Atty. Gen.,* 420 F. Supp. 217 (E.D. Ill. 1976), the court held that 18 U.S.C.

§4082(b) does not create "an expectation that no transfer will occur except upon proof of misconduct or other specified events" (*Id.* at 220).

In like vein, 18 U.S.C. §4081 requires that federal prisoners be classified in prisons, in light of their offenses, characters, and mental conditions, so as to provide them appropriate treatment:

> *Classification and Treatment of Prisoners*
>
> The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care and treatment of the persons committed to such institutions.

If the *Lono* rationale is applied to this statute, federal prisoners would have an interest in classification and programming decisions. Yet, the United States Supreme Court held that 18 U.S.C. §4081 merely reposes *discretion* in prison officials and not a reasonable liberty interest in prisoners:

> In *Meachum v. Fano,* 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451, for example, no due process protections were required upon the discretionary transfer of state prisoners to a substantially less agreeable prison, even where the transfer visited a "grievous loss" upon the inmate. The same is true of prisoner classification and eligibility for rehabilitative programs in the federal system. *Congress has given federal prison officials full discretion to control these conditions of confinement, 18 U.S.C. §4081, and petitioner has no legitimate statutory or constitutional entitlement sufficient to invoke due process.* (Emphasis added).

Moody v. Daggett, 429 U.S. 78, 88, n.9 (1976).

In *Curry-Bey v. Jackson,* 422 F. Supp. 926, 932 (D. D.C. 1976), the court held that the transfer of District of Columbia

inmates to federal custody was wholly "committed to" the discretion of prison officials:

> Regardless of the wisdom of such transfers, which often uproot the inmate and separate him from the rehabilitative influence of home and family, the decision to transfer or not is within the discretion of prison officials and is not subject to due process requirements of notice and hearing.

18 U.S.C. §5012 of the Youth Corrections Act provides:

> No youth offender shall be committed to the Attorney General under this chapter until the Director shall certify that proper and adequate treatment facilities and personnel have been provided.

Applying the *Lono* rationale to §5012, the only authorized purpose for commitment of youthful offenders under the Youth Corrections Act would be for the provision of specialized treatment. Commitment would have to be preceded by a determination of need and availability.

In *Robinson v. United States,* 474 F.2d 1085 (10th Cir. 1973) appellant argued that his sentence was illegal for failure to comply with the requirements of 18 U.S.C. §5012. There had been no certification from the Director of the Bureau of Prisons that proper and adequate treatment facilities were provided for him.

The *Robinson* court rejected that construction of §5012, holding that the certification provision was concerned with the starting point for the use of the Act.

> §5012 does not say that a certificate must be submitted to the trial court in every case where a youth offender is up for sentencing and we feel such an interpretation would be unreasonable. . . . This is not to say the statute requires the Government to furnish a certification to the sentencing court on the availability of facilities and personnel in every youth offender case and we decline to make such an interpretation.

Robinson, supra at 1091. As stated by another court, requiring certification of space before sentencing to the custody of the At-

torney General would be unnecessary and improper. *U.S. v. Lowery,* 335 F. Supp. 519 (D. D.C. 1971).

Except for those within the Seventh Circuit, where District Courts are constrained to follow the *Lono* reasoning, District Courts have almost uniformly rejected[2] the narrow reading of section 5003 in favor of a construction of the statute as reposing discretion in the federal officials to accept state prisoners if space is available. *Bowers v. Fenton,* 488 F. Supp. 570 (M.D. Pa. 1979); *Gomes v. Moran,* 468 F. Supp. 542 (D. R.I. 1979); *Fletcher v. Warden,* 467 F. Supp. 777 (D. Kan. 1979); *Shakur v. Bell,* 447 F. Supp. 958 (S.D. N.Y. 1978). *Accord, Goodnow v. Perrin,* ____N.H.____, 421 A.2d 1008 (1980).

B.

SECTION 5003(a) CANNOT BE INTERPRETED TO RESTRICT THE BUREAU OF PRISONS TO ONLY ACCEPTING STATE PRISONERS IN NEED OF SPECIAL TREATMENT SINCE SECTION 5003(c) AND THE RELATED STATUTORY SCHEME PERMIT THE BUREAU TO DENY STATE PRISONERS ACCESS TO TREATMENT PROGRAMS

When §5003(a) is considered in conjunction with §5003(c), it becomes clear that the section does not restrict the purposes for which the Bureau of Prisons can accept state prisoners.

Section 5003(c) provides, with certain exceptions not applicable here, that all state prisoners in federal custody shall be subject to the statutory and regulatory scheme governing the Bureau of Prisons. Specifically, that subsection provides:

> (c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall

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[2]In *Ali v. Gibson,* 483 F. Supp. 1102 (D. V.I. 1979), the court, *in dicta,* noted the split in authority and indicated a preference for the *Lono* holding. Counsel has found no other reported case, by a court from outside the Seventh Circuit, adopting the *Lono* interpretation.

be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.

Once it is concluded that state prisoners are subject to the federal scheme, it necessarily follows that they have no entitlement to receive any form of "treatment" after they are in the federal system. Federal prison officials are statutorily vested with full discretion to determine which inmates have access to rehabilitation programs. No inmate has an entitlement to participate in such programs. In *Moody, supra,* the Supreme Court observed:

> Petitioner also argues that the pending warrant and detainer adversely affect his prison classification and qualification for institutional programs. We have rejected the notion that every state action carrying adverse consequences for prison inmates automatically activates a due process right. In Meachum v. Fano . . . for example, no due process protections were required upon the discretionary transfer of state prisoners to a substantially less agreeable prison, even where that transfer visited a 'grievous loss' upon the inmate. The same is true of prisoner classification and eligibility for rehabilitative programs in the federal system. *Congress has given federal prison officials full discretion to control these conditions of confinement,* 18 USC §4081 [18 USCS §4081], *and petitioner has no legitimate statutory or constitutional entitlement sufficient to invoke due process.* (Emphasis added).

429 U.S. at 88, n. 9. Thus, "[f]ederal statutory law gives federal prison officials full discretion in the treatment of prisoners." *Walker, supra,* 558 F.2d at 1252. Classification and placement of a state prisoner in the federal system, under 18 U.S.C. §5003(c), ordinarily lies within the virtually unreviewable discretion of the Bureau of Prisons. *Roe v. United States Attorney,* 489 F. Supp. 4, 6 (E.D. N.Y. 1979). *See Cofone v. Manson,* 594 F.2d 934, 936, n. 1 (2d Cir. 1979).

Since §5003(c) makes the state prisoners subject to this same statutory scheme, they too have no entitlement to participate in treatment programs. Federal prison officials are therefore free to deny the state prisoners access to treatment programs for any number of reasons or for no reason at all. *See Meachum, supra; Moody, supra.*

Given this undeniable conclusion, it is readily apparent that the *Lono* majority's interpretation of part (a) of §5003 is erroneous. Vermont respectfully urges that it makes no sense to interpret §5003 as permitting the Bureau to accept only state prisoners who are in need of special treatment when, by the terms of the same and related statutes, it is free to deny the state prisoners access to treatment programs once they are in federal custody.

It is axiomatic that statutes will not be interpreted so as to yield absurd results. *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631 (1978); *Commissioner v. Brown,* 380 U.S. 563 (1965). Similarly, §5003(a)—as interpreted by the *Lono* majority—becomes meaningless in light of §5003(c) and the related statutory scheme. It is also a cardinal rule of statutory construction that such constructions are to be avoided. *Colautti v. Franklin,* 439 U.S. 379 (1979). The Supreme Court's task in interpreting separate provisions of a single act is to give the act the most harmonious, comprehensive meaning possible in light of legislative policy and purpose.[3] *Weinberger v. Hynson, Westcott & Dunning, Inc.,* 412 U.S. 609 (1973). It is necessary to look at the whole law and not be guided by a single segment in properly construing a statute. *Horton v. Califano,* 472 F. Supp. 339 (W.D. Va. 1979).

Because of §5003(c) and the statutory scheme governing the Bureau of Prisons, the only interpretation of §5003(a) logically consistent with §5003(c) and the controlling statutory scheme is that it does not restrict the Bureau's authority to accept state prisoners to those who are in need of special treatment.

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[3]Arguments on legislative purpose appear at IC, beginning at page 18, *infra.*

C.
THE LEGISLATIVE HISTORY OF 18 U.S.C. §5003 INDICATES THAT CONGRESS DID NOT INTEND TO LIMIT THE DISCRETION OF THE FEDERAL BUREAU OF PRISONS TO RECEIVE STATE INMATES

As a necessary preface to this part of respondent's argument, he first points out that under the most elemental concepts of statutory construction resort to legislative history must presuppose an ambiguity in the language of the statute itself.

The Circuit Court in *Howe, supra; Beshaw, supra; Fletcher, supra;* and *Lono, supra,* each rested its decision construing section 5003(a) on the language of the statute itself. Then each court subsequently resorted to legislative history to find support for its construction.

For the reasons which follow, respondent respectfully suggests that if it is necessary to resort to legislative history, the history can support only an interpretation of section 5003(a) as reposing discretion in the federal officials to receive state prisoners.

In its decision, the court in *Lono, supra,* relied heavily upon an August 31, 1951 letter from Deputy Attorney General Peyton Ford to Senator Pat McCarran, chairman of the Senate Judiciary Committee. However, *Lono*'s reference to the third paragraph[4] of that letter neglected the more telling fourth paragraph. The fourth paragraph indicates that the receipt of state prisoners should not be restricted, provided the federal government receives reimbursement from the transferring state:

> There is no apparent reason why the Federal facilities and personnel, if available, should not be made available for

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[4]The third paragraph, set forth in *Lono* at 647, reads: "Frequently, state officials request the Bureau of Prisons to undertake the custody, treatment, and training of State prisoners where specialized types of institutions and training programs are indicated but not available to the states—these requests usually relate to juveniles, concerning whom many of the states are without satisfactory institutions and training programs."

> State offenders, provided, of course, that the Federal Government is reimbursed for any expenses involved.

S. Rep. No. 978, 82 Cong., 1st. Sess. 2 (1951).

Senator McCarran similarly described the purpose of §5003 as providing a "reciprocal arrangement" for prisoner transfers between the states and the federal government:

> This bill would authorize a more or less reciprocal arrangement whereby, under certain conditions in a limited category of cases, at no expense to the Federal Government, the Attorney General may contract with State officials for the custody of persons convicted and sentenced under State laws.

97 Cong. Rec. 13543 (1951). The limitations referred to by Senator McCarran and Deputy Attorney General Ford were obviously whether federal prison space is available, and, if so, whether the transferring state would reimburse the federal government.

Lono's interpretation of the legislative history of §5003 was challenged by Circuit Judge Bauer in dissent:

> The majority opinion strains to find such language in the requirement that the Director of the Bureau of Prisons certify that "proper and adequate treatment facilities and personnel" be available. That certification requirement, however, speaks only to the necessity for determining whether appropriate facilities and personnel would be available for handling any prisoners received and cannot reasonably be construed as placing a substantive limitation or restriction on the purpose for which prisoners may be transferred.

Lono, supra at 649. The *Lono* majority also read the legislative history as allowing the "use by state prisoners of specialized programs, not available within the state prison system", citing H.R. Re. No. 1663, 82d Cong., 2d Sess. 1 (1952). *Id.* at 647. However, the House Committee language, relied upon by the court, merely explained the *need* for a statute like §5003 and did not in-

tend to create a substantive restriction on the receipt of state prisoners by the federal government.

The court in *Bowers v. Fenton,* 488 F. Supp. 570 (M.D. Pa. 1979), thought the *Lono* majority placed too much emphasis on one passage of the House Report.

> The *Lono* majority made much of a passage contained under the subheading "Contents of Bill" which, if read in isolation, supports the petitioners:
>
> > The proposed legislation restricts or limits the use of federal prison facilities to those convicted State offenders who are in need of treatment. The term "treatment" as used in this bill, in addition to its ordinary meaning of providing medical care, is also meant to include corrective and preventive guidance and training as defined in the Youth Corrections Act. . . .
>
> This single paragraph, however, cannot be dispositive. In order for it to negate the broad language of the statute and the "Statement" it would have to address the alleged limitation in the "Contents" more specifically and directly.

Bowers, supra at 573.

One stated purpose of §5003 is to ensure equal treatment of all prisoners:

> Uniformity in the treatment of all inmates is a very important element in the custodial administration of prisons; and all prisoners, when possible, should be treated alike in order that there be no favored inmates or group of inmates.

H.R. Re. No. 1663, 82d Cong., 2d Sess. 1 (1952), reprinted in (1952) U.S. Code Cong. & Admin. News, 1420–1422.

According to the House Report, the term "treatment" in this Bill, "in addition to its ordinary meaning of providing medical care, is also meant to include corrective and preventive guidance and training as defined in the Youth Corrections Act. . . ." *Id.* The definition of "treatment" in the Youth Corrections Act includes "correcting . . . antisocial tendencies". 18 U.S.C.

§5006(f). Thus, the term treatment can cover a wide range of penal endeavors that are not necessarily "specialized", but instead are rather commonplace in the modern field of corrections.

In re-examining its holding in *Lono, supra,* the Seventh Circuit recognized that treatment was intended to have a broad connotation.

> The Supreme Court has stated that the range of permissible "treatment" under the Youth Corrections Act is broad. *See Dorszynski v. United States,* 418 U.S. 424, 434 (1972). Thus, under the Act "treatment" has been construed to range from probation to maximum security incarceration. *Compare United States v. Glasgow,* 389 F. Supp. 217, 221 (D. D.C. 1975), *with Brown v. Carlson,* 431 F. Supp. at 773 (dicta). In addition, we think that the reference to "correcting . . . antisocial tendencies" in §5006(f) demonstrates that "treatment" is to be given a broader definition than just medical treatment, the limitation which petitioners would have us adopt.
>
> . . . Another section of the Youth Corrections Act also supports our conclusion that "treatment" may be construed to include maximum security incarceration accompanied by participation in "run-of-the-mill" programs. 18 U.S.C. §5011, which is captioned "Treatment," provides that "[c]ommitted youth offenders . . . shall undergo treatment in institutions of maximum security, medium security, or minimum security types. . . ." Based on these provisions, at least, Congress did not intend that maximum security incarceration and "treatment" were to be deemed mutually exclusive. Section 5011, read in conjunction with §5006(f), indicates that "treatment" may be construed to comprehend that kind of maximum security incarceration which provides an improvement in conditions and offers the greatest administratively feasible freedom of movement and access to programs.

Anthony, et al. v. Wilkinson, et al., ____F.2d____, Docket Nos. 79-2362, et al. (7th Cir. Dec. 23, 1980), *petition for cert. filed sub nom, Hawaii, et al. v. Mederios, et al.* (February, 1981). While recognizing that "treatment" is to be construed as running the whole range of penological purposes and functions, the Seventh Circuit, in *Anthony, supra,* continued to believe that a pretransfer determination is required.

The use of the word "correctional" (e.g. Federal Correctional Institution) appears to implicitly recognize that the Bureau of Prisons is designed not merely for punishment, but also for treatment. It follows that "treatment" was intended to be a general, not a specific term, the implementation of which was to be vested in the sound discretion of the Bureau of Prisons.

Indeed, the House Report expressly states:

> The purpose of the proposed legislation is to authorize the Attorney General, *when Federal facilities are available,* to contract with State and Territorial officials for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such States and Territories. (Emphasis added).

Id. at 1420.

There is nothing in the stated purpose which indicates that the term treatment was to have special significance. Rather, the proviso goes to the availability of federal facilities.

Further, with respect to Senator McCarran's comments that the bill was designed to provide a reciprocal arrangement, the House Report states:

> State prisons for many years housed and cared for Federal prisoners—until the Federal Government built its own institutions. Today, by statute, (sec. 4002, title 18, U.S.C.) the Attorney General is authorized to contract with State officials for the care and custody of our Federal prisoners. Pursuant to this authority, there were on August 31, 1951, approximately 3,000 Federal prisoners serving

> short sentences or awaiting trial in State, county and Federal institutions. The committee sees no reason why Federal facilities and personnel should not, in turn, be made available for State offenders, provided, of course, the Federal Government is reimbursed for any expenses involved. The instant bill makes provision for the payment for the use of Federal facilities and for attendant treatment and services rendered by Federal personnel. In this connection, the Senate, by amendment, has expressly provided that the Attorney General's contracts shall provide for "reimbursing the United States in full for all costs and other expenses involved."

Id. at 1421.

In *Beshaw, supra,* the Third Circuit summarized the legislative history arguments as follows:

> Beshaw points to the following language of the House Report as evidencing an intent to restrict the scope of Section 5003: "The proposed legislation restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment." H.R. Rep. No. 1663, *supra,* at 2.
>
> While this passage would appear facially to support Beshaw's interpretation of Section 5003, we do not find it controlling. The House Report was published on March 27, 1952, five months after Section 5003 had already been passed by the Senate. *See* 97 Cong. Rec. 13543 (Oct. 19, 1951). No language similar to that which appears in the House Report is contained in the Senate Report. We believe that the more restrictive view of the bill represented by the quoted portion of the House Report cannot override the language of the statute itself as enacted by both Houses of Congress—language that authorizes transfers not merely for treatment, but for "custody, care, subsistence, education, treatment, and training."

Id. slip opinion at 10, 11.

Therefore, a careful analysis of the legislative history of section 5003(a) fails to yield support for the conclusion that state to federal transfers must be preceded by a determination of specialized treatment needs available in the state.

D.
THE ADMINISTRATIVE INTERPRETATION OF 18 U.S.C. §5003 BY THE FEDERAL BUREAU OF PRISONS MUST BE GIVEN GREAT DEFERENCE

It is well-settled that the contemporaneous construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight and to the force and effect of law such that courts generally will not depart from such construction unless it is clearly erroneous. *NLRB v. Boeing Co.*, 412 U.S. 67, 75 (1973) ("[A] consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference by the Courts").[5]

In *Clardy v. Levi*, 545 F.2d 1241, 1245 (9th Cir. 1976), the court indicated that Congress' inaction in the face of the Federal Bureau of Prisons' firm belief that it was not governed by the APA constituted an acquiescence in that position.

Faced with a similar issue, the United States Supreme Court, in *United States v. City of Chicago*, 400 U.S. 8, 10 (1970), declined to second-guess the definition of a statutory term of the administrative agency charged with its interpretation; indeed, the court chose to "defer on this issue to the definition of 'train' given by the administrative agency which has oversight of the problem."

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[5] *Accord, Trafficant v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972) ("Such construction is entitled to great weight."); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–434 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Brubaker v. Morton*, 500 F.2d 200, 202 (9th Circ. 1974) ("A court faced with a problem of statutory construction should give great deference to the interpretation of a statute by the officers or agency charged with its administration.").

That case has particular efficacy herein because the recent body of correctional law, notably cases rendered by the United States Supreme Court, shows that even greater deference is given to discretionary choices made by prison officials regarding the placement of inmates. *See, Wolff v. McDonnell,* 418 U.S. 539, 566–567 (1974) (prison officials "must have the necessary discretion without unduly crippling constitutional impediments.") *Bell v. Wolfish,* 441 U.S. 520, 547 (1979). (Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices. . . .)

The interpretation given §5003 by the Federal Bureau of Prisons over the years is therefore quite relevant to a proper disposition of this case. It is unquestionable that the Bureau has never taken the position that §5003 requires a prior determination that specialized treatment is unavailable in the state system. It has, to the contrary, accepted state inmates for years without affording such a prior determination:

> The Bureau's administrative construction of the act as not limiting the Bureau to accepting only those prisoners in need of specialized treatment is "entitled to great weight and should be followed unless there are compelling indications that it is wrong."

Lono v. Fenton, supra at 649 (dissenting opinion of Circuit Judge Bauer).

Yet, Congress has not enacted legislation during this period to require the bureau to comply with its putative legislative intent. This inaction on the part of Congress should be interpreted as an indication of congressional intent that no such prior determination need be made by the bureau. Thirteen years after the adoption of §5003, Congress amended the statute to add subsection (d). Subsection (a), which is at issue before this Court, was left undisturbed.

As stated in *Fletcher v. Warden,* 487 F. Supp. 777 (D. Kan. 1979), a decision which finds the majority reasoning in *Lono* unpersuasive and specifically declines to follow it:

> If Congress were at serious odds with the construction given the statute by the Bureau of Prisons they surely would have made some change in the statutory language over the intervening quarter of a century since its passage. *We are faced with a long-standing and consistent interpretation by the agency charged with administration of the statute and that interpretation is entitled to strong judicial deference.* (Citations omitted; emphasis added).

487 F. Supp. at 781–82.

Indeed, the legislative history of the 1965 amendment expressly supports the construction long given §5003 by the Bureau of Prisons. The Senate Report contains no suggestion that §5003 limits transfers to those state prisoners who might require "treatment". Rather, the report refers to the broad purposes of transfer and specifies a number of objectives wholly inconsistent with the thought that the section authorizes transfers for only the purpose of specialized treatment.

The report states the purpose to be:

> This bill would permit the transfer of persons convicted of offenses in the Canal Zone to the custody of the Attorney General for *transfer to prisons within the United States.* (Emphasis added).

Sen. Report No. 799, 89th Cong. 1st. Sess. (1965), reprinted in (1965) U.S. Code Cong. Admin. News, 3595–3598. Under the part captioned *COST* in the Senate Report, it reads: "The Canal Zone Government estimates only three or four persons a year would be returned to the United States for *imprisonment.*" (Emphasis added). *Id.* at 3596. Further, a letter from the Assistant to the Governor of the Canal Zone, which is made a part of the report, explains the amendment as follows:

> The subject bill would amend title 18, United States Code, section 5003, *which authorizes the Attorney General to admit state prisoners to Federal penal and correctional in-*

stitutions when facilities are available, so as to make that section applicable to the Canal Zone.

Id. at 3597.

Clearly, Congress was then put on notice of the construction given 18 U.S.C. §5003(a) by the Federal Bureau of Prisons. By its inaction, Congress acquiesced in that interpretation.

II.

THE PROCEDURES FOLLOWED BY VERMONT PRIOR TO TRANSFERRING PETITIONER TO THE FEDERAL BUREAU OF PRISONS SATISFY ANY ARGUABLE STATUTORY REQUIREMENT[6]

Respondent contends that the exhaustive administrative hearing procedures embodied in Vermont Department of Corrections Policy #891 and the discretionary authority vested in the commissioner pursuant to 28 V.S.A. §706(a)[7] are sufficient as a matter of law to satisfy any pretransfer determination requirement.

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[6]The question presented by petitioner is whether the authority of the Federal Bureau of Prisons to accept state prisoners is "limited by statute". (Brief of Petitioner, page I.) *Amicus curiae,* Families & Friends of Prisoners, Inc., et al., in their brief attempt to present this Court with constitutional claims not raised below nor brought here by the parties. Each of the constitutional claims raised by *amicus curiae* has been examined previously by the District Court in Vermont. *Rebideau, supra; Battick v. Stoneman,* 421 F. Supp. 213 (D. Vt. 1976); *Hohman v. Hogan,* 458 F. Supp. 669 (D. Vt. 1978). None were found to present a constitutional infirmity with respect to state to federal transfer of Vermont prisoners.

If *amicus curiae* wish yet another judicial examination of those claims, they should present the questions first to a District Court in the proper case.

[7]28 V.S.A. §706 (a) (Supp. 1980) provides:

(a)The commissioner may enter into and execute a contract or contracts with the United States for the transfer of any inmate from any facility to a federal correctional facility when, in his opinion, the inmate needs particular treatment or special facilities available at the federal correctional facility; or, all in-state treatment and rehabilitative programs available for the inmate have been considered and found unsuitable; or, all in-state security and custody alternatives for the inmate have been considered and found unsuitable; or, the inmate voluntarily requests transfer.

Significantly, the administrative procedure for out-of-state transfer in general and Policy #891 in particular, both of which were applied in petitioner's case, are procedures established almost exclusively as a result of suggestions and guidance the Department of Corrections received from the United States District Court, District of Vermont.

In *Battick v. Stoneman,* 421 F. Supp. 213 (D. Vt. 1976), the court, in upholding the federal transfer of a Vermont prisoner in accordance with the procedures set out in Policy #891, ruled ". . . that the transfer of the plaintiff Battick to the custody of the United States Bureau of Prisons, pursuant to the provisions of 28 V.S.A. §706, does not offend the Constitution of the United States". 421 F. Supp. at 231. Earlier in that opinion the *Battick* court discussed the historical development of Policy #891, and noted that the policy's format evolved from judicial suggestion and guidance:

> These guidelines are consistent with judicial suggestions made in *Bousley & Messier v. Smith,* Civ. No. 6679 (D. Vt. June 11, 1973) concerning appropriate criteria for out-of-state transfer and are in keeping with the dictates of 28 V.S.A. §706 as amended.
>
> The administrative procedure established for making the decision on transfer of an inmate out of state was designed to conform with the guidance indicated in *Carlson v. Moeykens,* Civ. No. 74-224 (D. Vt. Jan. 24, 1975, amended Mar. 13, 1975).

See 421 F. Supp. at 216–17.

These administrative procedures were followed in the department's decision to transfer petitioner to the Federal Bureau of Prisons. Accordingly, after exhaustive administrative procedures, petitioner was found to require treatment and security not available within Vermont's correctional system.

As the District Court found, petitioner's incarceration in Vermont, within "D" Wing at St. Albans Correctional Diagnostic and Treatment Facility (CDTF), was under the most restrictive of conditions and permitted very limited program op-

portunities. Within a federal prison, however, petitioner enjoyed complete freedom of movement within the institution and access to a broad range of treatment programs. *Howe, supra,* 480 F. Supp. at 113.

State correctional facilities do not change so rapidly that the issue of their adequacy to hold and treat the highest security prisoners must be relitigated at each pretransfer hearing. Federal prison facilities do not change so rapidly that state officials must bring forth evidence of those superior facilities every time a prisoner is to be transferred. The issue at the pretransfer hearing was whether the petitioner, because of his individual circumstances, was unsuited for any in-state treatment or security alternatives.

The determination made by the Commissioner after the hearing was that the Vermont Department of Corrections could not provide the required degree of security nor treatment programs within his security classification. The Commissioner knew of the Federal Bureau of Prisons' security and treatment capabilities. *Id.* at 113. Implicit in his decision to direct petitioner's transfer to the federal system was the determination that the federal system is able to provide for these needs.

Finally, in a practical sense, the degree of security needed in an individual case will define the treatment alternatives available. A correctional system, with its dual goals of prisoner rehabilitation and public protection, cannot be expected to treat a prisoner if it cannot control him, and often it cannot control him without highly restrictive conditions of confinement. Such restrictions, however, often prevent meaningful efforts toward the initial goal of reformation. Thus, if the greater resources of the federal prison system can provide a more open and meaningful rehabilitative setting for high security prisoners, there is no reason to distinguish that type of specialized treatment from psychiatric, psychological, and medical services, or vocational and educational programs, or treatment for drug and alcohol addicts and youthful offenders.

Accordingly, Respondent Ciuros submits there was a pre-

transfer determination that the federal system could provide specialized treatment which was not available within the Vermont correctional system. The pretransfer procedures, therefore, more than satisfy any arguable requirements of section 5003(a).

III.

PROPER CONSTRUCTION OF 18 U.S.C. §5003, AUTHORIZING STATE TO FEDERAL TRANSFERS OF PRISONERS, RESTS ON THE LANGUAGE OF THE STATUTE AND NOT ON POLICY CONSIDERATIONS RAISED BY PETITIONER

Petitioner, in his brief to this Court, interjects certain policy considerations which he believes vitiate against a plain meaning construction of section 5003(a). He first argues that Vermont is a signatory to the New England Corrections Compact, 28 V.S.A. §§1401 et seq.; and to the Interstate Corrections Compact, 28 V.S.A. §§1601 et seq. These Compacts authorize the party states to contract with each other for the confinement of an inmate convicted of a crime in the sending state in an institution situated in the receiving state.

Petitioner contends that if confinement is what the state needs, it can proceed pursuant to one of the compacts.[8] The question presented to this Court, however, is whether section 5003 permits a state to federal transfer absent a determination of specialized treatment needs not available in the state. If the question were one of which is the better option, the teachings of Chief Judge Holden would be particularly applicable here:

> Transfer of prisoners to the federal system was adopted over correctional facilities in sister states for the reason that the federal system, with its vast resources and broad base of varying types of facilities for different classifications of persons committed to its custody, could better serve the needs

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[8]Petitioner is correct; the state does sometimes transfer an inmate to another state when circumstances suggest that is the better course.

> of rehabilitation and confinement than any other correctional system. The federal policies of correction are more in keeping with those of the State of Vermont. Vermont's neighboring states are confronted with much the same budgetary problems that beset this state and the facilities available in the neighboring states are not equipped to accept additional out of state transfers.

Rebideau v. Stoneman, 398 F. Supp. 805, 811 (D. Vt. 1975), *aff'd* 575 F.2d 31 (2d Cir. 1978) (per curiam). The question presented for review by this Court, however, is not one of which option is the better. Rather, it is a question of whether one option, that of federal transfer, is permissible under the existing statutes without a pretransfer determination of specialized need. As this Court admonished in *Bell v. Wolfish,* 441 U.S. 520 (1979),

> [T]he inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution, or in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside the Judicial Branch of Government.

Id. at 562. Accordingly, petitioner's argument of the options available to the state has no bearing on the resolution of the question he presented to this Court: whether 18 U.S.C. §5003(a) requires a state to federal transfer of a prisoner be preceded by a determination of specialized treatment needs not available in the state.

Petitioner further argues that the state was able to incarcerate him tolerably well for many months prior to his transfer to the federal system. During the entire period, however, petitioner was a detentioner.[9] As this Court observed in *McGinnis v. Royster,* 410 U.S. 263 (1973):

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[9]Petitioner was sentenced on 2 February 1977. His transfer hearing was conducted on 22 February 1977.

> [I]t would hardly be appropriate for the state to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence.

Id. at 273.

The intent of the statute is to be found in its language. *United States v. Goldenberg,* 168 U.S. 95 (1897). The "policy implications" raised by petitioner would be better directed to the legislative branch of government.

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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